



**A.F.R.**  
**Reserved On 19.01.2026**  
**Delivered on 17.02.2026**

**HIGH COURT OF JUDICATURE AT ALLAHABAD  
LUCKNOW**

**WRIT - C No. - 383 of 2026**

Smt. Johra Begam Alias Johra Khatoon

.....Petitioner(s)

Versus

State of U.P. Thru. Prin. Secy. Deptt. of Revenue and 3 others

.....Respondent(s)

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|---------------------------|-----------------------|
| Counsel for Petitioner(s) | : Rakesh Kumar Saini, |
| Counsel for Respondent(s) | : C.S.C.,             |

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**Court No. - 25**

**HON'BLE AMITABH KUMAR RAI, J.**

**1.** Heard learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

**2.** The instant writ petition has been filed challenging the order dated 10.12.2025 passed by District Judge, Gonda in Civil Appeal No.54 of 2024, Smt. Johra Begam @ Johra Khatoon vs. Ishhaq Ali, filed under Section 96 of the Code of Civil Procedure, 1908 (*hereinafter referred to as "C.P.C."*), whereby the substitution application filed by the petitioner under Order XXII Rule 4 of C.P.C. along with the application for condonation of delay was rejected and the appeal was also dismissed, holding it to be abated due to the death of the sole respondent.

**3.** The facts relevant for the purpose of disposal of the present petition are that the petitioner, on the death of her father, Late Jumai, on 08.04.2008, came into possession of the land in question being the successor and the relevant entries in the revenue records were entered, bringing on record the petitioner as tenure holder of the agricultural land and the other properties.

**4.** It has been submitted by the counsel for the petitioner that the mother of the petitioner also died on 08.03.2008, one month prior to the death of her father. However, one Ishhaq Ali, having no succession right over the property in question, on the basis of a fraudulent will deed, claimed titled right of the agricultural land mentioned in the will deed. The petitioner, on coming to know of the fraudulent will deed dated 20.01.2006, filed suit for cancellation of the will deed along with relief for permanent injunction before the Civil Judge (Junior Division), Gonda on 26.05.2008. The suit was decreed ex parte vide judgment and order dated 18.07.2011, and the will deed dated 26.05.2008 was cancelled. Against the order dated 18.07.2011, Ishhaq Ali filed an application for restoration on 23.08.2011, which was allowed vide order dated 13.03.2014, and the ex parte judgment and order dated 23.08.2011 was recalled. Ultimately, the suit filed by the petitioner was dismissed vide ex parte judgment and order dated 22.11.2024. Feeling aggrieved, the petitioner filed Civil Appeal No.54 of 2024 on 18.12.2024, impleading Ishhaq Ali as the sole respondent in the appeal.

**5.** It is the case of the petitioner that she was not aware of the fact that Ishhaq Ali by that time had died on

10.07.2023, and in ignorance, she filed the appeal against the dead person. However, when she came to know about the death of Late Ishhaq Ali, she filed an application for substitution along with an application for condonation of delay under Order XXII Rule 4 C.P.C. for impleading the legal heirs of the deceased, Ishhaq Ali. It seems that notices were issued on the application for substitution and for condonation of delay and the legal heirs of the deceased Ishhaq Ali filed objections to both the applications. The Court, after taking into consideration the objections, rejected the application for condonation of delay, consequentially rejecting the substitution application vide impugned judgment and order dated 10.12.2025 and closed the proceedings of the appeal holding it to be abated.

**6.** Learned counsel for the petitioner has argued that the Court of District Judge, Gonda, has wrongly rejected the application for condonation of delay in filing the substitution application, in as much as the petitioner was not aware of the death of Late Ishhaq Ali at the time of filing of the appeal and as soon as the petitioner, coming to know of the death of Ishhaq Ali, immediately filed an application for substitution along with application for condonation of delay. The appellate Court, without appreciating reasons assigned in the application for condonation of delay and substitution application, rejected both applications, which is per se illegal.

**7.** Having heard learned counsel for the petitioner as well as learned counsel for the State, the issue that falls for consideration is what would be the fate of appeal filed against a dead person who was the sole defendant.

The petitioner filed an application for substitution of legal heirs of the defendant under Order XXII Rule 4 C.P.C. which reads as under :-

*4. Procedure in case of death of one of several defendants or of sole defendant.*

*(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.*

*(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.*

*(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.*

*(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.*

*(5) Where-*

*(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963) and the suit has, in consequence, abated, and*

*(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act,*

*the Court shall, in considering the application under the said Section 5, have due regard to the fact of such ignorance, if proved.*

**8.** A bare perusal of the aforesaid provision and its analysis indicates that an application for substitution of legal heirs is maintainable only when the defendant has died during the pendency of the appeal. In the present case, it is an admitted fact that the sole defendant died prior to the filing of the appeal, and the appeal was filed against a dead person. Thus, this Court is of the view that the application filed by the petitioner under Order XXII Rule 4 C.P.C. was not maintainable at all.

**9.** The other issue that falls for consideration is what would have been the proper course to be followed by the petitioner in such a situation, when the petitioner came to know about the death of the sole defendant after filing the appeal. The other option could have been to file an application under Order I Rule 10 C.P.C., read with Sections 151 and 153 C.P.C., for amendment of the appeal so as to bring on record the legal heirs of the deceased defendant. However, this Court is of the view that since the appeal was filed against a dead person, the appeal, from its inception, was a nullity; as such, an application under Order I Rule 10 C.P.C. for amendment would also not have been maintainable.

**10.** Neither an application under Order XXII Rule 4 nor under Order I Rule 10 C.P.C. could be permitted for substitution of the legal heirs of the sole defendant who had died prior to the filing of the appeal. The reason being that there was only one defendant and he had died before the appeal was instituted, therefore, such an appeal was itself a nullity and no application for amendment of the appeal under Order I Rule 10 C.P.C., or under Order XXII Rule 4 C.P.C., for deleting the name of the original defendant and substituting any person in his place, can be permitted. In such a scenario, the only permissible course is to move an application under Order XXIII Rule 1(3) C.P.C. for withdrawal of the appeal, with liberty to file a fresh appeal impleading the legal heirs of the sole defendant.

**11.** This issue came up for consideration before the Bombay High Court in the case of ***Indana International Ltd. v. Santana Miguel Fernandes, 2007 SCC OnLine Bom 381***, wherein the Court held in paragraphs 6 and 7 as under:

*6. The learned trial Court has made a correct observation that the legal heirs of a sole defendant who is dead, cannot be brought on record, since the suit against a dead person itself is a nullity. In fact, it appears that to prevent this, that the plaintiff sought to withdraw the suit itself, which has been denied on the ground that the suit is a nullity.*

*7. Undisputedly, such a suit must be held to be a nullity and therefore not instituted at all. However, it does not follow that the fact that a suit has been filed upon payment of Court fees must be ignored. In such a case, the withdrawal that is sought by the plaintiff must be viewed as a request for withdrawal of the filing of the suit*

*which is the physical aspect of the suit. For this purpose therefore, filing of the suit against a dead person must be treated to be a formal defect within the meaning of Order 23, Rule 1(3) since the defect is in the nature of mis-joinder and non-joinder.*

**12.** The Punjab and Haryana High Court, while dealing with a similar issue in **Naseem Hushain v. Mahender Kaur, 2015 SCC OnLine P&H 8414**, held in paragraph 4 as under:

*4. In the present case, petitioners while filing the suit had impleaded Virsa Singh as defendant No. 1. However, defendant No. 1 had already died on 22.12.1999, whereas, the suit was filed in the year 2008. The said fact was highlighted by defendant No. 1 at the time of filing of the written statement. Thereafter, petitioner No. 1 moved an application for bringing on record the legal representatives of deceased-Virsa Singh. However, the said application was dismissed. Since the defendant No. 1 was already dead at the time of filing of the suit, the trial Court should have permitted the petitioners to withdraw the suit with permission to file a fresh one on the same cause of action as per law.*

**13.** The Karnataka High Court in **C. Muttu v. Bharath Match Works, Sivakasi, 1963 SCC OnLine Kar 88**, held that such a suit is a nullity from its inception. The Court has also held that any proceedings taken in such a suit are non est. For ready reference paragraph no.9 is quoted hereinbelow :-

*9. A careful review of the decisions of the several High Courts relating to substitution of a defendant in a suit in place of the original defendant makes it clear(1) that no such substitution can be permitted in a case where there was a sole defendant, (2) where there are more defendants than one and one of them*

*was dead when the suit was filed, the Courts have held that the legal representatives of the deceased defendant can be brought on record subject to any question of limitation that may be raised by the legal representatives of the deceased person who were brought on record as the suit had been validly presented in so far as the living defendants are concerned, and (3) where an appeal is filed against a person who was dead on the date of the presentation of the memorandum of appeal, the Courts have held that the appellant can be permitted to bring the legal representatives of the dead person on record. In other words, the Courts have held that substitution is permissible. The principle on the basis of which the Courts have taken this view is that an appeal is a continuation of the original proceedings and as the suit had been validly instituted and the defendant died subsequently, an application to bring his legal representatives under Order XXII, Rule 4 is maintainable and the legal representatives can be brought on record. But in cases where there was a sole defendant and he was dead before the suit was instituted, all the High Courts have held that such a suit is a nullity and no application for amendment of the plaint by deleting the name of the original defendant and substituting another person in his place, can be permitted. In Municipal Corporation of Karachi v. Baradiojumoo Mughal, AIR 1946 Sind 20 Thadani, J. after reviewing the decisions of the several High Courts dealing with this question, held that Where a suit is filed against a dead person, a Court has no jurisdiction to grant an application under O.I.R. 10, or under O. 22, Rr. 4 and 9 or do any other act authorised by the Civil Procedure Code, as the suit filed against a dead person, is a nullity. His Lordship further held that bona fides or mala-fides of the plaintiff are immaterial. There is no direct decision of the Supreme Court on the point. But some observations of the learned Chief Justice in Hira Lal v. Kalinath AIR 1962 SC 199 lend*

*support to our view that a suit filed against a dead person is a nullity. This is what the learned Chief Justice says:*

*"The only ground on which the decision of the High Court is challenged is that the suit instituted on the original side of Bombay High Court was wholly incompetent for want of territorial jurisdiction and that therefore, the award that followed on the reference between the parties and the decree of the Court, under execution, were all null and void. Strong reliance was placed upon the decision of the Privy Council in the case of *Ledgard v. Bull*, 13 Ind App 134 (PC). In our opinion, there is no substance in this contention. There was no inherent lack of jurisdiction in the Bombay High Court where the suit was instituted by the plaintiff-decree-holder. The plaint had been filed after obtaining the necessary leave of the High Court under Clause 12 of the Letters Patent. Whether the leave obtained had been rightly obtained or wrongly obtained is not a matter which can be agitated at the execution stage. The validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction or 'that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties*

*to it. But in the instant case there was no such inherent lack of jurisdiction.”*

**14.** In the instant case, this Court finds that under ignorance, the petitioner filed the appeal against the dead person which is a “formal defect” as it is a case of misjoinder of party and in such a situation, the proper course would have been to file an application for withdrawal of appeal with permission to file fresh under Order XXIII Rule 1(3) C.P.C.

**15.** In **V. Rajendran v. Annasamy Pandian, (2017) 5 SCC 63**, the issue before the Hon’ble Supreme Court was that a suit for permanent injunction had been filed in respect of the suit property. After filing of the written statement, the plaintiff came to know that the respondents, while transferring the patta in respect of the suit property (Survey No. 192/9), had transferred it as Survey No. 192/14. This fact was not in the knowledge of the plaintiff at the time of filing the suit. The plaintiff filed an application for withdrawal of the suit under Order XXIII Rule 1(3) C.P.C., which was allowed by the trial court. However, in the revision before the High Court, the order of the trial court was set aside on the ground that the plaintiffs had failed to establish either a “formal defect” or sufficient grounds for withdrawal of the suit. For ready reference paragraph Nos.8 to 13 of **V. Rajendran (Supra)** are quoted hereinbelow :-

*8. The High Court vide the impugned order held that the defect mentioned by the appellants in the application seeking withdrawal of suit, is not a “formal defect” and that the provision of withdrawal of the suit contemplated under Order 23 Rule 1(3) CPC cannot be allowed to be misused by the parties. The High Court took*

*note of the fact that the appellants participated in the trial of the suit for about a decade and when the suit was listed for framing additional issues and for examining the additional witnesses, the appellants moved abruptly an application seeking withdrawal of the suit on an inapposite ground which could have been easily addressed by way of an application under Order 6 Rule 17 CPC for amendment of pleadings and that the appellants failed to establish either a "formal defect" or "sufficient grounds" for withdrawal of the suit.*

*9. Order 23 Rule 1(3) CPC lays down the following grounds on which a Court may allow withdrawal of suit. It reads as under:*

*"1. Withdrawal of suit or abandonment of part of claim.—(1)-(2) \* \* \**

*(3) Where the Court is satisfied—*

*(a) that a suit must fail by reason of some formal defect, or*

*(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim."*

*(emphasis supplied)*

*As per Order 23 Rule 1(3) CPC, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order 23 Rules 1(3)(a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order 23 Rule 1(3) CPC for withdrawal of the suit with liberty to bring a fresh suit only if the condition in*

either of the clauses (a) or (b), that is, existence of a "formal defect" or "sufficient grounds". The principle under Order 23 Rule 1(3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action.

10. In K.S. Bhoopathy v. Kokila [K.S. Bhoopathy v. Kokila, (2000) 5 SCC 458] , it has been held that it is the duty of the Court to be satisfied about the existence of "formal defect" or "sufficient grounds" before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the "formal defect" or "sufficient grounds", such right cannot be considered to be so absolute as to permit or encourage abuse of process of court. The fact that the plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the plaintiff to claim or to do so to the detriment of legitimate right of the defendant. When an application is filed under Order 23 Rule 1(3) CPC, the Court must be satisfied about the "formal defect" or "sufficient grounds". "Formal defect" is a defect of form prescribed by the rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, misjoinder of parties, failure to disclose a cause of action, etc. "Formal defect" must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties.

11. In terms of Order 23 Rule 1(3)(b) where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to withdraw the suit. In interpretation of the words "sufficient grounds", there are two views : one view is that these grounds in clause (b) must be "ejusdem generis" with those in clause (a), that

*is, it must be of the same nature as the ground in clause (a), that is, formal defect or at least analogous to them; and the other view was that the words "other sufficient grounds" in clause (b) should be read independent of the words a "formal defect" and clause (a). Court has been given a wider discretion to allow withdrawal from suit in the interest of justice in cases where such a prayer is not covered by clause (a). Since in the present case, we are only concerned with "formal defect" envisaged under clause (a) of Rule 1 sub-rule (3), we choose not to elaborate any further on the ground contemplated under clause (b), that is, "sufficient grounds".*

*12. In the present case, the appellants have filed the suit describing the suit property as Survey No. 192/9 but the respondents are said to have transferred the patta for the suit property settling as Survey No. 192/14. The defect in the survey number of the suit property goes to the very core of the subject-matter of the suit and the entire proceedings would be fruitless if the decree-holder is not able to get the decree executed successfully and thus, the said defect will constitute to be a "formal defect" within the meaning of Order 23 Rule 1(3)(a) CPC. That apart, the respondents are said to have executed an Inam settlement deed on 21-9-2012, in favour of their son Aranmanai Pandian, mentioning the suit property as Survey No. 192/14. We are convinced that the case of the appellants would fall under clause (a) of Rule 1(3) CPC.*

*13. In the facts and circumstances of the case, the trial court considered the allegation set out in the application as a ground for withdrawal. The view taken by the trial court that the suit suffered from a formal defect to allow the appellants to withdraw the suit with permission to institute a fresh suit, is correct. The High Court, in our view, was not right in interfering with the discretion exercised by the trial court,*

*permitting the appellants to withdraw the suit with liberty to file a fresh suit. Based on the order passed by the trial court, the appellants have already filed suit before the District Munsif and the same is numbered as OS No. 11 of 2015. The High Court while passing the order on 9-3-2015 [Annasamy Pandian v. V. Rajendran, 2015 SCC OnLine Mad 261 : (2015) 2 LW 360] does not seem to have kept in view the said suit filed by the appellants. In the facts and circumstances of the case, the impugned order passed by the High Court cannot be sustained.*

*(Emphasis supplied)*

**16.** From the above discussion it can be succinctly summaries that :

(a) The suit or appeal against the sole defendant, who died before filing of suit/appeal, is nullity since its inception and non est.

(b) Neither any application under Order XXII Rule 4 C.P.C. nor under Order I Rule 10 C.P.C. is maintainable in such suit/appeal.

(c) Since the suit/appeal is nullity since its inception, hence no question of dismissal of such suit/appeal arises as being abated.

(d) The suit/appeal against the sole defendant who died prior to filing of the suit/appeal suffers from the defect of misjoinder of necessary party and is a "formal defect" and in such situation proper course is to move application under Order XXIII Rule 1(3) C.P.C. for withdrawal of suit/appeal with permission to file fresh suit/appeal.

**17.** In view of the above discussion, this Court is of the view that since the Civil Appeal No.54 of 2024 filed by

the petitioner against the dead person (sole defendant) was a nullity, the substitution application along with application for condonation of delay moved by the petitioner under Order XXII Rule 4 of the C.P.C. was not maintainable itself, and the proper course would have been to move an application under Order XXIII Rule 1(3) of C.P.C. by the appellant/petitioner for withdrawal of the appeal with permission to file a fresh appeal impleading the legal heirs of the deceased, Late Ishhaq Ali.

**18.** The District Judge, Gonda vide impugned order dated 10.12.2025 has rejected the application for substitution filed under Order XXII Rule 4 C.P.C. on the ground of delay, whereas the application itself was not maintainable as indicated hereinabove and as such the order dated 10.12.2025 to that extent calls for no interference. However, this Court finds that while passing of the order dated 10.12.2025, the District Judge, Gonda has also held that the appeal itself stands abated and has been consigned to record. In this regard, it is worthwhile to mention that the provisions of Order XXII Rule 4 of the C.P.C. are attracted in cases where a party dies during the pendency of the proceedings and not in a case where the suit or appeal is a nullity from its inception, as there is no pending proceeding in which an application for substitution can be made and hence no question arises of abatement of such suit or appeal. It has consistently held that a suit/appeal filed against the dead person at the time of institution is a nullity and this principle is rooted in the fundamental legal tenet that a dead person has no legal existence and, therefore, cannot be sued or be a party to any legal proceedings.

**19.** Thus, the order dated 10.12.2025 passed by District Judge, Gonda in Civil Appeal No.54 of 2024, Smt. Johra Begam @ Johra Khatoon vs. Ishhaq Ali to the extent that the appeal has been abated is incorrect inasmuch as the appeal itself was a nullity since its inception and therefore, no question arises of the appeal being dismissed as abated. In fact there was a "formal defect" in the institution of the appeal as a dead person was impleaded as sole defendant, who was died prior to filing of the appeal. The appropriate remedy in such a situation was filing of an application under Order XXIII Rule 1(3) C.P.C. for withdrawal of the appeal, with permission to file a fresh appeal impleading the legal heirs of the deceased, Late Ishhaq Ali.

**20.** Thus, in the peculiar facts and circumstances of the present case, it is provided that if the petitioner files an application under Order XXIII Rule 1(3) C.P.C. for withdrawal of the appeal, with permission to file a fresh appeal impleading the legal heirs of the deceased, Late Ishhaq Ali within a period of one month from today, the learned appellate court shall consider the same on its own merits and pass an appropriate order in accordance with law. After all, procedure is meant only to facilitate the administration of justice and not to defeat it.

**21.** The writ petition is **disposed of**. No order as to costs.

**(Amitabh Kumar Rai,J.)**

**February 17, 2026**

Ashish Dewal